

ATTACHMENT D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et. al.,:

Plaintiffs,

vs.

FIRST DATA CORPORATION and
CONCORD EFS, INC.,

Defendants.

Docket No. CA 03-2169

Washington, D.C.
Monday, November 24, 2003
4:40 p.m.

TRANSCRIPT OF TELECONFERENCE
BEFORE THE HONORABLE ROSEMARY M. COLLYER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiff
United States:

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Richard Cook, Esquire
Scott Scheele, Esquire
Matthew Hammond, Esquire
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(and as coordinating
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1 MR. CONRATH: Your Honor, this is Craig Conrath for
2 the United States, with me is Scott Scheele, Richard Cook and
3 Matthew Hammond.

4 MS. FISHER: This is Rebecca Fisher on behalf the
5 state of Texas and on behalf of the plaintiffs states
6 generally.

7 MR. GRIMM: This is Dick Grimm, Richard Grimm on
8 behalf of the state of New York.

9 MS. ALEXIS: This is Gerri Alexis on behalf of First
10 Data Corporation and I have with me Chris Hockett, Frank Hinman

7 Justice Department on September 22nd. So there is at least
8 that much information before the Justice Department that they
9 could have their expert opine and we went ahead and had our
10 experts opine even though for most of their opinions they are
11 pure rebuttal to what the government expert said and we did
12 that because this Court said that we should submit the expert
13 reports on all issues and then supplement on December 1st and
14 give further rebuttal if necessary.

15 And that's the course we're following and here we are in
16 the situation where the Government said we will not get this
17 gentleman's report until October, I mean until December 3rd and
18 that's just unacceptable, Your Honor. We cannot prepare
19 accurately getting that at the last minute.

20 MR. PATTON: Your Honor, could I just briefly raise
21 two points.

22 We have made great headway working together on scheduling
23 issues, but when we went to Your Honor on the 29th the second
24 of the two days where we had that back to back, one of the
25 principal issues was experts.

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1 We had two issues, one was timing but the other one was
2 sequencing. And the defendants had proposed Your Honor it's
3 the party who bears the burden of proof who should go first and
4 then the other party should go second.

5 And the Government was adamantly opposed to that. They
6 insisted on a simultaneous exchange of expert reports and on
7 that issue Your Honor I agreed with them.

8 Now as Ms. Alexis just mentioned the bulk of this stuff
9 and probably 90 some odd percent of what our experts have
10 opined on in the reports that they filed last Wednesday we are
11 responding the Government has at least the ultimate burden of
12 proof and the initial burden of persuasion.

13 And you know we thought that we had to put all of the, the
14 order could be clear for all opinions we have albeit based on
15 information available to you at the time the complaint was
16 filed. And there was a plethora of material on efficiencies
17 and so forth that had been produced to them, available to them.
18 I think that the amounts have not changed. The claimed
19 efficiencies have not changed. All of that's happening in the
20 interim there's been implementation towards realizing those
21 efficiencies, but they have been on the table and before the
22 Department of Justice before they were claimed.

23 The second point is this, in trying to accommodate them
24 and quite frankly we should have checked with Your Honor first
25 but tried to work out with them and respond to their concern

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1 and they kind of I may be using too strong a word, but we agree
2 to try to avoid having a dispute raised to Your Honor to
3 further delay their efficiencies expert report from the 1st to
4 the 3rd and all of a sudden we don't, we find out Friday night
5 that they've got a new expert found out today as we expected
6 Friday night an efficiencies expert and they're going to try to
7 wait for the 3rd for the first time to let us know what their
8 opinions are on efficiencies.

9 THE COURT: Okay, and I appreciate everybody's
10 position. I have now reviewed the language of the specific
11 scheduling in case management order.

12 I agree with the defendants as to the intention of the
13 Court that everybody was suppose to put out an initial or
14 preliminary whatever you want to call it expert report for
15 information as of before October 23, but the language of the
16 Court's order certainly provides a basis for Mr. Conrath to
17 have reached a conclusion he did which is that he didn't need

18 to serve his rebuttal expert report in until December 1.

19 And so I understand the basis for his believing that and
20 I find no error in his believing that since it was my language
21 that was perhaps less specific than it might have been under
22 the circumstances.

23 However, the intention was to have all experts issue at
24 least a preliminary expert report based on the information that
25 they had available to them as of October 23, so that all

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1 parties could properly or at least hopefully properly prepare
2 for trial to the best of their abilities.

3 Therefore, Mr. Conrath, it will be necessary for your
4 expert on efficiencies Dr. Zmijewski, I think I said that wrong
5 forgive me doctor, to prepare an expert report based, at least
6 a preliminary expert report, based on the information that he
7 had available to him or more specifically that the Government
8 had available to it as of October 23rd, given the fact that
9 that, I don't know what the status of that report might be and
10 whether or not he has been working on such an animal or not.

11 The request of the motion is that it be filed by
12 November 26th, that would be a good date if it could be filed
13 by November 26th, but the Court would give him until
14 November 28th, which is Friday of this week if it were
15 necessary for him to take that additional time since this order
16 is only being issued Monday afternoon, and experts are
17 particularly persnickety at times.

18 But I think that given the purpose of the Court's
19 scheduling order that that's the best way to resolve the issue
20 and the ambiguity in a sense that's in it. So again the Court
21 finds no, nothing wrong in the Government's position because I
22 can find a reason for it in the order, but it is inconsistent
23 with the concept behind the order so Dr. Zmijewski will have to